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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended	)	CC Docket No. 96-149
	)	
Request for Comment in Connection with Court Remand of Non-Accounting Safeguards Order	)	DA 00-2530

To: The Commission

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in response to the Commission's *Public Notice* in the above-referenced proceeding.[1] Cox files these comments for the limited purpose of responding to the Commission's inquiries regarding the relationship between information services and telecommunications, as those terms are defined under the Communications Act.[2] As described below, the Commission should reaffirm its conclusion, reached in several orders implementing provisions of the Telecommunications Act of 1996 (the "1996 Act"), and reiterated in its 1998 *Report to Congress*, that there is a bright line between information services and telecommunications.

This proceeding addresses certain questions regarding the applicability of the "special provisions" of the Communications Act governing Bell company offerings of interLATA services.[3] In particular, the Commission seeks to determine if the restrictions on Bell company

[1] "Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order," *Public Notice*, CC Docket No. 96-149, DA 00-2530, rel. Nov. 8, 2000 (the *"Public Notice"*).
[2] *See* 47 U.S.C. § 153(20) (information service), (43) (telecommunications).
[3] *See* 47 U.S.C. §§ 271-276.

offerings of interLATA services, as that term is defined in the Act, apply to "interLATA information services," as that term is used in Section 272 of the Act. One important element of this inquiry is whether an entity that provides an information service also simultaneously must be providing telecommunications as an integrated component of its information service offering.[4]

The Commission has had repeated opportunities to consider this issue. Each time it has done so, the Commission has examined the meaning of "information service" and concluded that the provision of information services, by itself, does not turn the information services provider into a provider of either "telecommunications" or "telecommunications services." As demonstrated below, this conclusion is consistent with the statutory definitions, the regulatory consequences that Congress intended to flow from the statutory categories, and the overriding policies of the 1996 Act: "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ."[5] As the Commission itself has noted, the bright line distinction between regulated telecommunications services and unregulated information services is the cornerstone of the vibrantly competitive market that exists today for the Internet and for interactive computer services. It is essential that this crucial distinction be preserved.

First, and most importantly, the statutory terms provide a clear distinction between information services and telecommunications. The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of

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[4] *Public Notice* at 1, 2-3.
[5] *See* S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. at 1 (1996).

information of the user's choosing, without change in the form or content of the information as sent and received."[6] In other words, telecommunications is the pure, unenhanced transmission of information on behalf of a third party. By contrast, the Act identifies the provision of information services as something more than pure transmission, by defining that term as follows:

> [T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.[7]

This language makes the difference between the offering of telecommunications and the offering of information services obvious – if the provider does not alter the form or content of the transmission, it is offering telecommunications (or telecommunications service); if the provider does choose or manipulate the form or content of the transmission, the provider is offering an information service. There is no overlap at all between these two types of service.[8]

The Commission has relied upon this analysis repeatedly to establish a bright-line distinction between the regulated "basic" service offerings of common carriers and the non-regulated "enhanced" service offerings of other types of providers. This distinction was summarized and discussed at length in the Commission's 1998 *Report to Congress* on universal service issues. In that report, the Commission stated unequivocally that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."[9] Further, the Commission recognized the central proposition "that Congress intended to maintain

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[6] 47 U.S.C. § 153(43).
[7] 47 U.S.C. § 153(20).
[8] As the Commission has recognized on many occasions, many information service providers also may, but are not required to, offer telecommunications services as common carriers. *See, e.g.*, Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11530 (1998) (*"Report to Congress"*) (local exchange carrier "cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail," but offering "a single information service with communications and computing components" does not subject a provider to Title II regulation).
[9] *Id.*, 13 FCC Rcd at 11520.

a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[10] As the definition acknowledges, transmission is necessarily a component of a vast array of information services that traverse the public and private networks, but that fact alone cannot bring all information service providers under the regulatory mandates of Title II of the Act. Indeed, such a result would be directly contrary to the express policy embodied in section 230 "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[11] Moreover, when an information service provider self-provisions the underlying telecommunications capacity it uses to furnish information services, the Commission has concluded that the information services provider should not be treated as a telecommunications carrier.[12] Any other result would effectively penalize facilities-based information service competitors, by singling them out for regulation under Title II while permitting all other competitors in the information services marketplace to go unregulated. This, of course, would turn one of the fundamental goals of the 1996 Act – to promote facilities-based competition – completely on its head.

The *Report to Congress* is part of a long line of Commission decisions reaching as far back as the original *Computer II* order, which determined that "enhanced service providers" (a category that is the functional equivalent of information service providers) were not common carriers.[13] Since Congress codified this distinction in the 1996 Act, the Commission has

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[10] *Id.*, 13 FCC Rcd at 11508. The Commission also concluded that it was "the intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation." *Id.*, 13 FCC Rcd at 11523.

[11] 47 U.S.C. § 230(b)(2).

[12] *See, e.g.*, *Report to Congress*, 13 FCC Rcd at 11330 (adopting functional analysis based on service user receives, rather than separating integrated service into components).

[13] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), *Final Decision*, 77 F.C.C.2d 384, 430 (1980).

affirmed it at every opportunity, including in the initial *Local Competition Order,* the *Universal Service Order,* and the *Non-Accounting Safeguards Order* that is the subject of this proceeding.[14] The Commission's consistent maintenance of the bright-line distinction between regulated common carrier services and the unregulated enhanced and information service offerings of non-carriers has been a cornerstone of the unfettered free market that presently exists for the Internet and other interactive computer services.

In light of the plain statutory language and the Commission's repeated, consistent conclusion that information services and telecommunications are "mutually exclusive," there is no basis to revisit, let alone modify, that conclusion at this time. Rather, the Commission should affirm these earlier determinations and should ensure that any decision in this remand proceeding treats information services in a fashion consistent with the *Report to Congress* and the Commission's other orders and precedent.

[14] *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15990 (1996) (denying interconnection rights to information services providers because they do not provide telecommunications services); Federal-State Joint Board on Universal Service, *Report and Order,* 12 FCC Rcd 8776, 8179 (1997) (entities providing information services are not thereby providing telecommunications service); Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, *as amended, First Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd 21905, 21956 (1996) (affirming that essential meaning of "information service" is the same as "enhanced service").

For all these reasons, Cox respectfully requests that the Commission act in accordance with these comments.

Respectfully submitted,

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November 29, 2000

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, do hereby certify that on this 29th day of November, 2000, copies of the foregoing "Comments of Cox Communications, Inc." were sent via first-class mail, postage prepaid to the following:

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